

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY WAYNE ROEDER,

Defendant-Appellant.

UNPUBLISHED

June 5, 2007

No. 269785

Marquette Circuit Court

LC No. 04-042159-FH

Before: Schuette, P.J., and O’Connell and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial conviction of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(c) (incapacitated victim). The trial court sentenced defendant to a prison term of 10 to 25 years. We affirm.

I. FACTS

On May 2, 2001, the complainant’s siblings, their friend, and defendant, had been drinking in the Rosaleses’ basement for a couple of hours. The complainant’s siblings and their friend decided to go for a walk while defendant stayed at the house. The complainant, who was 17 years old at the time of the incident, was sleeping with her mother on opposite ends of their large, sectional couch, when she awoke to defendant digitally penetrating her vagina. The complainant testified that defendant had his arm on her neck and told her to “be quiet” after she began to cry. The complainant was scared and told defendant to stop several times, but he continued and attempted to kiss her and began biting her chest. The complainant attempted to wake her mother by kicking her, but she could not reach her. After hearing the complainant’s siblings and their friend come back inside after returning from their walk, defendant got up, and the complainant “just laid there and cried.”

At trial, the prosecutor introduced MRE 404(b), i.e., other acts, evidence concerning three individuals who testified about similar incidents that had occurred between them and defendant. On two occasions, the trial court provided the following limiting instruction to the jury regarding the other acts evidence:

Members of the jury, you have heard from the last witness and will hear from the next several witnesses evidence that is being introduced to show that the

defendant allegedly has engaged in improper sexual conduct for which he is not on trial.

If you believe this evidence, you must be very careful to consider it for only one limited purpose. That is to help you judge the believability of the testimony regarding the acts for which the defendant is now on trial. You must not consider this evidence for any other purpose. For example, you must not decide that it shows the defendant is a bad person or that the defendant is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct.

Defendant was convicted, and this appeal followed.

II. JURY INSTRUCTION

Defendant argues that the trial court's limiting instruction on the other acts evidence was erroneous. We disagree.

A. Standard of Review

Defendant's argument is unpreserved, so our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. Analysis

Under MRE 404(b), our Supreme Court has articulated a four-part test for admitting other acts evidence: (1) the evidence is offered for a proper purpose rather than to prove the defendant's character or propensity to commit the crime, (2) the evidence is relevant to an issue or fact of consequence at trial, (3) the evidence is not unduly prejudicial under the balancing test of MRE 403, and (4) the trial court may, upon request, provide a limiting instruction to the jury. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). A proper purpose includes "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act[.]" MRE 404(b).

In *People v DerMartzex*, 390 Mich 410, 412, 415; 213 NW2d 97 (1973), our Supreme Court held that the trial court did not abuse its discretion by allowing a minor child to testify about numerous uncharged sexual acts committed against her by the defendant who was ultimately convicted of sexually assaulting the child. After acknowledging that MCL 768.27 allowed testimony if it was evidence of showing the defendant's scheme, plan, or system in doing the act, the Court reasoned that "[l]imiting her testimony to the specific act charged and not allowing her to mention acts leading up to the assault would seriously undermine her credibility in the eyes of the jury. Common experience indicates that sexual intercourse and attempts thereat are most frequently the culmination of prior acts of sexual intimacy." *Id.* at 413-415; see also *People v Layher*, 238 Mich App 573, 586; 607 NW2d 91 (1999), *aff'd* 464 Mich 756 (2001). Following *DerMartzex*, our Supreme Court has continued to hold that testimony from or evidence concerning individuals other than the complainant about sexual assaults between those individuals and the defendant is inadmissible to bolster the complainant's credibility because those acts were not associated with the principal transaction between the

defendant and the complainant. *People v Jones*, 417 Mich 285, 288-290; 335 NW2d 465 (1983), accord *People v Sabin (After Remand)*, 463 Mich 43, 69-70; 614 NW2d 888 (2000), and *People v Engelman*, 434 Mich 204, 222; 453 NW2d 656 (1990).

There are at least two theories for introducing other acts evidence of a common plan, scheme, or system: (1) to show that the charged and uncharged acts are parts of a larger plan, or (2) to show that a common plan, scheme, or system was devised and executed repeatedly to perpetrate separate yet very similar crimes. *Sabin, supra* at 63. In *Engelman*, our Supreme Court explained that such evidence, when properly admitted, is used as proof to infer that the alleged, criminal conduct occurred. *Engelman, supra* at 220-221. “Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002) (internal citation omitted).

Here, contrary to defendant’s argument, the limiting instruction was not improper. The jury was instructed that, if believed, the testimony of the other individuals was to be used solely for the purpose of assisting in determining whether the sexual assault did occur, i.e., whether the complainant’s testimony about the sexual assault was true in light of the evidence of the common plan or scheme. The instruction did not allow use of the other acts evidence to generally bolster the complainant’s credibility. Additionally, the jury was properly instructed that the testimony could not be used as propensity evidence.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues that he is entitled to a new trial because his counsel was ineffective. We disagree.

A. Standard of Review

Defendant failed to raise his ineffective assistance claim below, so our review is for errors apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

B. Analysis

To establish a claim of ineffective assistance of counsel, a defendant bears a heavy burden. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Specifically, a defendant must show that counsel’s performance was objectively unreasonable and that, but for defense counsel’s errors, there was a reasonable probability that the result of the proceeding would have been different. *Id.* at 600. In addition, there is a strong presumption that defense counsel’s performance was sound trial strategy. *Id.* Constitutional error warranting reversal does not exist unless counsel’s error was so serious that it resulted in a fundamentally unfair or unreliable trial. *Lockhart v Fretwell*, 506 US 364, 369-370; 113 S Ct 838; 122 L Ed 2d 180 (1993); *People v Pickens*, 446 Mich 298, 312 n 12; 521 NW2d 797 (1994).

Defendant first argues that his trial counsel was constitutionally ineffective for failing to object to the allegedly improper jury instruction. We disagree.

As previously discussed, the jury was not instructed to consider the other acts testimony for an improper purpose; therefore, it was not objectively unreasonable for defense counsel to fail to object to the instruction. Further, as a matter of trial strategy, defense counsel may have reasonably elected not to request a limiting instruction about why the testimony was admissible, i.e., to show a common scheme or plan, to keep from inferring to the jury that certain instances were part of a devious plan. Rather, defense counsel chose to focus on discrediting those witnesses. This Court will not use hindsight in determining whether a different strategy should have been taken. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999).

We also reject defendant's argument that his trial counsel was constitutionally ineffective for failing to object to instances of alleged prosecutorial misconduct.

"The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Generally, appellate review of alleged improper prosecutorial remarks is precluded absent an objection because the trial court is deprived of its opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). But an exception exists where a failure to consider the error would result in a miscarriage of justice or if a curative instruction could not have eliminated the prejudicial effect. *Id.*

Defendant challenges the prosecutor's remarks where he stated that the charged act had occurred because lightning does not strike four times in the same place and otherwise referred to the other acts evidence. A prosecutor is free to argue all reasonable inferences arising from the evidence as related to his or her theory of the case and is given "wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms." *People v Dobek*, ___ Mich App ___; ___NW2d ___ (Docket No. 264366, issued January 30, 2007), slip op pp 3-4. We find nothing impermissible concerning those remarks because the prosecutor was allowed to argue that the charged act occurred in light of the other acts testimony.

Affirmed.

/s/ Bill Schuette
/s/ Peter D. O'Connell
/s/ Alton T. Davis